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In the
Supreme Court of the United States

OCTOBER TERM, 1982

A. S. HORNER, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Does the failure of a party to request review by the National Labor Relations Board (NLRB herein) of a decision issued by one of its regional directors waive the right to obtain judicial review under 29 U.S.C. § 160(e) and (f) where the issues have been fully litigated before the Agency?

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, A.S. Horner, Inc. (Horner herein) respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit entered on May 26, 1982 and July 13, 1982, respectively.

QUESTION PRESENTED

Does the failure of a party to request review by the National Labor Relations Board (NLRB herein) of a decision issued by one of its regional directors waive the right to obtain judicial review under 29 U.S.C. § 160 (e) and (f) where the issues have been fully litigated before the Agency?

OPINIONS BELOW

The Opinion of the Court of Appeals, in a decision not for routine publication, and the Decision of the National Labor Relations Board, 246 NLRB 393 (1979), appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 13, 1982. A timely petition for rehearing was denied on September 7, 1982, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this application are:

Statutes:

29 U.S.C. § 153(b) (1976)
29 U.S.C. § 158(a) (1), (5) (1976)
29 U.S.C. § 159(a) (1976)
29 U.S.C. § 160(e), (f) (1976)

Regulations:

29 C.F.R. § 102.60 (a) (1981)
29 C.F.R. § 102.63 (1981)
29 C.F.R. § 102.67 (1981)
29 C.F.R. § 102.69 (1981)

The text of these statutes and regulations is somewhat lengthy and is set forth in the appendix.

STATEMENT OF THE CASE

Horner is a New Mexico corporation which performs highway, heavy and light engineering construction. R. 13-15. Horner employs workers in various construction crafts and has voluntarily extended recognition to the International Union of Operating Engineers, Local 953 as the collective bargaining representative of employees operating heavy construction equipment. On July 21, 1978 the New Mexico District Council of Carpenters, a craft union, filed an election petition with the Albuquerque, New Mexico office of the NLRB. R. 69. The Union sought to represent persons employed as carpenters, iron workers, laborers, truck drivers, and cement masons employed at one of Horner's projects in New Mexico. R. 69.

On August 1, 1978 the Regional Director conducted a hearing at which Horner appeared and objected to the designation of a single project unit as appropriate. Horner further objected to the appropriateness of the proposed multicraft unit as opposed to units drawn along craft lines and submitted its evidence bearing on the issue. The evidence showed that historical practice in the industry and the area required a unit restricted along craft lines. Horner presented other evidence pointing to the inappropriateness of a multicraft unit. Post-hearing briefs were submitted to the Regional Director, in which Horner argued that the multicraft unit was inappropriate for purposes of collective bargaining.

On August 23, 1978 the Regional Director issued his Decision and Direction of Election in which he found that the single project unit was inappropriate and ordered an election in a statewide unit. However, he sustained the designation of a multicraft unit concluding that there existed a community of interest between the employees designated in the petition.

An election in the multicraft unit was conducted on September 22, 1978. A majority of valid votes were cast in favor of the Union.

Horner filed timely objections to the election. In its objections Horner reiterated its position that a multicraft bargaining unit was inappropriate. R. 84. On November 14, 1978 the Regional Director issued his Supplemental Decision on Objections to Conduct Affecting Results of Election and Certificate of

Representative. The Regional Director overruled Horner's objection that the bargaining unit was inappropriate soley on the basis that Horner had waived the objection by failing to request review under 29 C.F.R. § 102.67(c). R. 97-98.

Horner subsequently filed a request for review of the Regional Director's Supplemental Decison. R. 102. On January 16, 1979 the Board denied the request for review stating that the request for review failed to raise "substantial issues warranting review." Thereafter, Horner refused to bargain with the District Council, unfair labor practice charges were filed, an NLRB complaint issued, and the General Counsel moved for summary judgment. Horner's response to the motion for summary judgment reiterated its position that the bargaining unit was inappropriate. R. 260.

On November 8, 1979 the Board issued its Decision and Order which granted the General Counsel's motion for summary judgment. The Board found that the issues raised by Horner had previously been litigated in the representation proceeding, and adopted the Regional Director's previous Decision finding that "Respondent's failure to contest the Regional Director's unit determination...through the request for review procedure constituted a waiver of its right to appeal that in a subsequent proceeding." R. 293. Thereafter, Horner sought judicial review by filing its petition for review under § 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), with the United States Court of Appeals for the Tenth Circuit. In its brief before the Tenth Circuit, Horner argued, *inter alia*, that the Regional Director's finding that a multicraft unit was appropriate was arbitrary, an abuse of discretion, not supported by substantial evidence and not supported by NLRB precedent. Horner further argued that the Regional Director's Decision failed to set forth sufficient findings of fact to support his unit determination in order to permit proper court review, and that the case should be remanded to the Board for findings in order to permit such review. The Board cross-petitioned for enforcement of its Order.

The Tenth Circuit denied Horner's petition for review and granted the Board's cross-petition for enforcement. With respect to the bargaining unit issue the court agreed with Horner that the Regional Director had failed to set forth sufficient findings of fact supporting his unit determination to

allow review. However, the court declined to remand the case for proper findings because the court noted that there was no requirement that the Board make a determination independent from the Regional Director of the appropriate bargaining unit. Nevertheless, the court determined that Horner had waived its right to obtain court review by failing to request review of the Regional Director's Decision issued after the hearing. While expressly recognizing that the waiver rule as applied by it may "produce a harsh result," the court concluded that due process did not require that it consider Horner's position that the unit was inappropriate because of Horner's failure to request review in the first instance.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Significant and Recurring Problems Concerning the Standards for Judicial Review of Fact Under § 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. § 160(e) and (f).

A precise understanding of the NLRB procedural regulations is crucial to understanding why the writ should issue.

In order to accommodate the substantial volume of cases filed with the NLRB year after year, authority to process election and unfair labor practice cases has been delegated to the Board's regional directors.[1] This authority includes the authority to conduct elections under § 9(a) of the Act, 29 U.S.C. § 159(a), and to determine in individual cases the unit in which collective bargaining is appropriate. 29 U.S.C. § 153(b). *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). Decisions of the regional directors with respect to unit determinations are subject only to discretionary review by the Board. 29 C.F.R. § 102.67(c). This court has held that plenary review of a regional director's unit determination is not required by the statute. *Magnesium Casting Co.*, 401 U.S. 137.

1. During the fiscal year that ended September 30, 1980 the NLRB handled some 8,350 election cases involving some 536,914 employees. 45 NLRB ANN. REP., Table 11 (1980)

Pursuant to its statutory authority, the NLRB has adopted regulations which establish procedures for processing both election and unfair labor practice cases. Election cases are initiated by filing an election petition with an appropriate regional director. 29 C.F.R § 102.60(a). Absent agreement, the regional director investigates the petition and, after issuing an appropriate notice, schedules a hearing on the petition. 29 C.F.R. § 102.63. Issues which may be heard under this procedure include whether the unit designated in the petition is appropriate for purposes of collective bargaining. 29 C.F.R. § 102.67. Parties to the proceedings are permitted to file post-hearing briefs with the regional director on issues raised. 29 C.F.R. § 102.67. After the hearing the regional director is required to set forth his "findings, conclusions, and order or direction." 29 C.F.R. § 102.67(b). The Agency's regulations provide that the regional director's decision is final, subject to any party filing a request for review with the Board. 29 C.F.R. § 102.67(b). Review of the regional director's decision within the categories of review permitted is entirely discretionary with the Board. 29 C.F.R. § 102.67(b); *Magnesium Casting Co.*, 401 U.S. 137.

Of the 1,971 decisions issued by the Board's regional directors during the fiscal year ending September 30, 1980, requests for review were filed in 798 cases. The Board reviewed 101 of these cases, 19 of which resulted in reversal of the regional director's decision. 45 NLRB ANN. REP., Table 3B (1980). Therefore, in less than one percent of the decisions issued by the Board's regional directors in election cases in fiscal year 1980 was a regional director's decision reversed by the Board in its pre-election request for review procedure.

If the regional director finds, after the hearing, that a question concerning representation affecting commerce is raised, the regional director then conducts an election in the unit found to be appropriate. 29 C.F.R. § 102.69(a). Within five days of the date the tally of ballots is delivered to the parties (normally on the date of the election), any party may file objections to the conduct of the election or conduct affecting the results of the election. 29 C.F.R. § 102.69. The regional director then investigates the objections, may conduct a hearing if substantial issues warranting a hearing are raised, and, in cases where the regional director has previously directed an

election, he may exercise his discretion to either (i) issue a report on objections or (ii) issue a decision disposing of the objections or challenges. 20 C.F.R. § 102.69(c). If the regional director through the exercise of his discretion issues a report on objections, the parties have an absolute right to file exceptions to the report, which does not become final until adopted by the Board. 29 C.F.R. § 102.69(c). Under this procedure the decision on objections is issued by the Board itself, after consideration of the record and any exceptions to the report filed by the parties. 29 C.F.R. § 102.69(c). However, if, as occurred below, the regional director exercises his discretion and issues a supplemental decision, a party disagreeing with the regional director's decision must request review under the procedures and standards set forth for requesting review after pre-election hearings. 29 C.F.R. § 102.69 (d).

During fiscal year 1980 the Agency issued 1,710 decisions on objections or challenges. Of these, 535 were issued directly by regional directors. Requests for review of supplemental decisions of regional directors' decisions were filed in 70 cases. Review was granted in only five cases and the Board decided only one case on review, which was affirmed. 45 NLRB ANN. REP., Table 38 (1980). Therefore, during fiscal year 1980, the Board failed to reverse supplemental post-election decisions of its regional directors in a single case where requests for review were sought.

Decisions of the Board in election cases are not ordinarily reviewable at the conclusion of the proceeding. *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940). Under ordinary circumstances an employer seeking judicial review of a decision by a regional director must first refuse to bargain with the union. The Board then issues an unfair labor practice complaint under § 8(a) (1) and (a) (5) of the Act, 29 U.S.C. § 158(a)(1) and (a)(5). The unfair labor practice proceeding does not consider issues which were previously litigated in the election proceeding. 29 C.F.R. § 102.67(f). Similarly, parties are prohibited from raising in the subsequent unfair labor practice proceeding any issue which was in fact the subject of a request for review which was denied. *Id.* Unless extraordinary circumstances or newly discovered evidence is presented, the record in the unfair labor practice case is therefore identical to the record established in the election case.

Ordinarily, after the unfair labor practice case is at issue, the Agency through its General Counsel moves to transfer the case to Washington, and moves for summary judgment on the theory that all matters raised in the unfair labor practice proceeding have already been determined in the election case. The Board routinely grants the motion and issues its order to bargain upon request. At this point for the first time the party aggrieved by an adverse decision in the election case may seek court review. Court review is restricted by statute to objections raised "before the Board, its member, agent, or agency...unless excused by extraordinary circumstances." 29 U.S.C. § 160(e).

As noted above, the decision as to whether to grant review even where the regulations suggest review is appropriate, is entirely discretionary with the Agency. Moreover, the standard for review of *fact* within these criteria requires the Board to determine that "the regional director's decision on a substantial factual issue is *clearly erroneous* on the record." 29 C.F.R. § 102.67(c) (2). Court review under 29 U.S.C. § 160(e) on the other hand, requires review based on "*substantial evidence* on the record considered as a whole." Congress specifically rejected a "clearly erroneous" standard for review under 29 U.S.C. § 160(e) in favor of the more liberal "substantial evidence" standard. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951),

The effect of the Tenth Circuit's decision, then, is to require that parties request review before the Board in order to obtain subsequent court review even in circumstances where it would be futile to do so because the decision did not satisfy the clearly erroneous standard, but nevertheless is not supported by substantial evidence. Moreover, as noted above, the possibility of obtaining reversal of the regional director's decision is so statistically remote as to be almost nonexistent.[2] Furthermore, the result reached by the court, as argued by the Agency, is not fairly suggested even by the Board's regulations.

2. Of course, impossibility or improbability of obtaining adequate relief is a well recognized exception to the general exhaustion doctrine. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.07 at 97 (1958 and Supp. 1970).

The regulations do place parties on notice that unless review is requested the decision of the regional director shall be "final" and that the failure to request review or the denial of a request precludes the party from raising the issue in a "subsequent unfair labor practice proceeding." 29 C.F.R. § 102.67(b) and (d). However, the regulations and the statute do not suggest that the failure to request review precludes future *court review* on the evidentiary record made at the time the issues are fully litigated before the regional director. The statute requires only that the issue be raised before the "Board, its member, agent, or agency." 29 U.S.C. § 160(e).

As noted above, the lower court, while noting that the "waiver rule may produce a harsh result" and agreeing with Horner that the Regional Director's Decision "failed to set forth sufficient findings of fact supporting his unit determination," declined to remand solely because Horner had waived its right to obtain court review. Therefore, the court upheld the Regional Director's Decision without considering whether the decision was supported by substantial evidence in the record before it. In so doing the court failed to discharge its statutory obligation under § 10(e) to review fact based on substantial evidence in the record where issues have been presented to the "Board or its agent." It also abdicated its responsibility to review Agency decision making in a manner which this Court has previously found improper:

> Reviewing courts are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional mandate underlying a statute. Such review is always properly within the judicial provence, and the courts would abdicate their responsibility if they did not fully review such administrative decisions.

NLRB v. Brown, 380 U.S. 278, 293 (1965).

The court found that the Regional Director failed to make the proper findings to permit court review, findings which are required by both statute and regulation. 29 U.S.C. § 160(e); 29 C.F.R. § 102.67(b) ("A decision by the regional director upon the record shall set forth his findings..."). All that was required was a remand to the Agency for findings which proper-

ly should have been made in the first instance by the Regional Director.

2. The Decision Below, Conflicts With other Courts Of Appeals Concerning the Right To Obtain Judicial Review Under 29 U.S.C. § 160(e) And (f).

It is clear from a close reading of the cases that the Tenth Circuit is imposing a much stricter standard for judicial review of Board decision making than has been imposed by other circuits which have considered the issue. The effect is to impose more time consuming and expensive procedural preconditions to judicial review in NLRB cases than have been required by other circuits. In all instances parties in the geographic area encompassed by the Tenth Circuit must request review by the Board, even where to do so would be futile. As noted above, this requirement conflicts with requirements of § 160(e) requiring only that issues be raised before the Board or its agent.

The decision conflicts with the Third Circuit's decision in *NLRB v. Capital Bakers, Inc.*, 351 F.2d 45 (3rd Cir. 1965), where the Board had found the employer violated § 8(a)(1) and (5) of the Act by refusing to bargain with the union in one of four of the employer's plants after the Board found each plant individually was an appropriate bargaining unit. Like Horner, the employer in *Capital Bakers* appeared at the hearing and contested the appropriateness of the single plant unit. The regional director decided the unit question adversely to the employer. The employer did not request review. As did Horner, the employer filed a post-election request for review which was denied. As did Horner, the employer contended in the subsequent unfair labor practice proceeding that the unit was inappropriate. Like Horner, the employer argued before the court that the bargaining unit was inappropriate and contrary to the requirements of the National Labor Relations Act. The Third Circuit held that the employer was not barred from raising the unit question since this question had been raised from the inception of the proceeding[3] and the Board was adequately apprised of the employer's intention to rely on its objections to the unit determination. 351 F.2d at 48.

[3] Horner raised its objections to the appropriateness of the multicraft unit with the Board's hearing officer on August 1, 1978, only eleven days after the petition was filed.

The decision also conflicts with the Ninth Circuit's decision in *St. Elizabeth Community Hospital v. NLRB*, 626 F.2d 123 (9th Cir. 1980), where the employer failed to raise the jurisdictional issue with the regional director before the election or in post-hearing objections. In *St. Elizabeth Community Hospital* the court rejected the Board's contention that § 10(e) precluded court review. 626 F.2d at 125.

In addition, the decision below is disturbing in that it indicates that the Tenth Circuit is continuing to rely on its decision in *NLRB v. Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969), where the request for review procedure was in fact used by the employer immediately after the initial hearing, but no post-election "objections"[4] were filed to the regional director's report and the court concluded that this failure precluded court review even though the issue had been presented to the regional director during the pre-election hearing and review had been requested. 406 F.2d at 701, 702 citing *NLRB v. Rexall Chemical Co.*, 370 F.2d 363 (1st Cir. 1967). Moreover, the decision below and *Thompson Transport* conflict with other decisions in the circuits which have considered the issue. *See, e.g., Consolidated Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981) (§ 10(e) is satisfied where objections were sufficiently specific to put the Board on notice that the issue may be pursued on appeal); *Proctor & Gamble Manufacturing Co. V. NLRB*, 658 F.2d 968, 988 (4th Cir. 1981) *petition for cert. filed* 50 U.S.L.W. 3984 (U.S. June 3, 1982) (No. 81-2226) (§ 10(e) requirements are satisfied where the matter has been briefed and argued before the Board prior to court enforcement proceedings); *NLRB v. Blake Construction Co.*, 663 F.2d 272, 284 (D.C. Cir. 1981) (§ 10(e) does not require "a triumph of technical pleading over fundamental fairness."); *AMCAR Division, ACF Industries v. NLRB*, 596 F.2d 1344, 1350 n. 8 (8th Cir. 1979) (issue preserved for review where exceptions not filed but issue was implicitly raised at every step of proceeding); *NLRB v. Annapolis Emergency Hospital Assn.*, 561 F.2d 524 (4th Cir. 1977) (§ 10(e) does not bar court consideration of issue where (1) the purpose of § 10 (e) was fully

[4] The regulations do not provide for "objections" to regional directors' reports. Rather "exceptions" or a request for review is appropriate, depending on whether the regional director issues a report or a decision. 29 C.F.R. § 102.69(c).

served because a decision over which review was sought originated with the Board; (2) issue was raised in administrative proceeding; and (3) Board's error was a purely legal one); *Lake City Foundary Co. v. NLRB*, 432 F.2d 1162, 1182 (7th Cir. 1970) (purpose of § 10(e) is to afford Board an opportunity to pass on issue as a prerequisite to court review; exceptions to examiner's report adequate to preserve review under § 10(e)).

Furthermore, the position taken by the Court of Appeals conflicts with the entire trend of modern rules of procedure which favor consideration of disputes on the merits in order to permit substantial justice. *Cf.* Fed. R. Civ. P. 1. In light of the different positions taken by the courts of appeals on issues raised by this application, Horner submits that review is appropriate.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Tenth Circuit.

Respectfully submitted,

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Dated: October 7, 1982

NOT FOR ROUTINE PUBLICATION

United States Court of Appeals
Tenth Circuit

A. S. HORNER, INC.,
Petitioner

v. No. 79-2185

NATIONAL LABOR RELATIONS BOARD,
Respondent and
Cross-Petitioner

On Petition for Review and Cross-Application
For Enforcement of an Order of The
National Labor Relations Board
(Case No. 28-RC-3517

Nicholas J. Noeding (Barbara L. Shapiro with him on the brief) of Poole, Tinnin & Martin, Albuquerque, New Mexico for Petitioner-Appellant.

Bernard P. Jeweler (John H. Ferguson and Sara M. Green, Attorneys, William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, on the brief), National Labor Relations Board, Washington, D.C., for Respondent-Appellee

Before McWILLIAMS and BARRETT, Circuit Judges, and ANDERSON, District Judge.*

BARRETT, Circuit Judge.

*Chief Judge of the United States District Court for the District of Utah, sitting by designation.

Petitioner, A. S. Horner, Inc. (Horner) seeks review of an order of the National Labor Relations Board (NLRB) directing Horner to cease and desist from refusing the bargain collectively with the New Mexico District Council of Carpenters, AFL-CIO (District Council). Respondent, NLRB, cross-petitions for enforcement of its order.

Horner is a New Mexico corporation engaged in highway and engineering construction work throughout the State of New Mexico. On July 21, 1978, the District Council filed a petition for certification with the Albuquerque, New Mexico office of the NLRB. The District Council sought to represent all of Horner's employees employed at one particular project except heavy equipment operators already represented by another union.

At the pre-election hearing on the petition, Horner objected to the designation of a single-project unit because that particular project was soon to be completed. Horner further objected to the appropriateness of the proposed multi-craft bargaining unit as opposed to units drawn along craft lines.

On August 23, 1978 the regional director of the NLRB issued a Decision and Direction of Election (initial decision) wherein he found the single-project unit inappropriate and ordered an election in a state-wide unit. However, the regional director did sustain the designation of a multi-craft unit, concluding that there existed a community of interest between the employees. The regional director also found that those employees who were employed during the payroll period immediately preceding the date of his decision were eligible to vote at the election.

The election was held on September 22, 1978. The majority of the voters cast their ballots in support of the union. On September 29, 1978 Horner filed objections to the election alleging that the election should be set aside because, (1) the District Council had made misrepresentations to the employees at pre-election meetings, (2) the District Council improperly extended a waiver of initiation fees to employees who would sign authorization cards prior to the election, (3) the designation of a multi-craft unit was inappropriate, and (4) certain employees were disenfranchised as a result of the voter eligibility formula employed by the NLRB. Although no hearing on the objections was held, Horner was allowed to submit evidence in support thereof.

On November 14, 1978, the regional director issued a Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certificate of Representative (supplemental decision). In this supplemental decision, the regional director overruled Horner's first two objections on their merits. The regional director further concluded that Horner had waived the last two objections concerning the appropriateness of the bargaining unit and the voter eligibility formula by failing to make a request for review of the director's initial decision. Thus the regional director certified the District Council as the exclusive bargaining representative of Horner's employees. On December 5, 1978 Horner filed a request for review of the regional director's supplemental decision.[1]

The Board denied the request for review by telegram dated January 16, 1979. The Board stated that the request failed to raise "substantial issues warranting review". Thereafter Horner refused, upon request, to bargain with the District Council and an unfair labor practice proceeding was instituted against Horner. Horner answered the charge by contending that the District Council had not been properly elected or certified.

The case was transferred to the Board in Washington on May 1, 1979. The general counsel for the NLRB filed a motion for summary judgment. Horner responded that summary judgment was not proper inasmuch as material issues of fact existed and resolution of those issues necessitated formal hearings which had previously been denied.

On November 8, 1979, the Board issued a decision wherein it granted the general counsel's motion for summary judgment. The Board found that the issues raised by Horner had already been litigated in the representation hearing and adopted the regional director's previous finding that Horner had waived its objections to the appropriateness of the multicraft unit and the voter eligibility formula.

[1] Although the Board states in its brief that the request for review was timely made, subsequent statements at oral arguments raised the issue of timeliness. The supplemental decision states that the request for review was required to be filed by November 27, 1978. It appears that Horner made a motion for an extension of time within which to file the request for review. It is not clear what the disposition of that motion was. In any event, the Board acted upon the request. Accordingly, we will consider the request as timely made.

In its petition for review, Horner contends that, (1) the NLRB denied it due process at all stages of the proceedings, (2) the regional director's finding that a multi-craft unit was appropriate was arbitrary, an abuse of discretion and not supported by substantial evidence, (3) the voter eligibility formula utilized by the regional director was erroneously applied and an abuse of discretion, and (4) the Board erred in its treatment of Horner's objection to the election concerning the District Council's alleged misrepresentations.

I.

Horner contends that the Board denied it due process by concluding that Horner had waived its right to object to the regional director's findings as to the appropriateness of the multi-craft bargaining unit and the voter eligibility formula. Specifically, in his supplemental decision, subsequently adopted by the Board, the regional director concluded that Horner's failure to request review of the initial decision prior to the election, as provided for by Reg. 102.67(b), 29 C.F.R. § 102.67(b), amounted to a waiver of those objections. Horner admits that it failed to request review of the initial decision but contends that such failure did not amount to a waiver. Horner asserts a right to object to the regional director's findings by post-election objections, based on the rationale that the pre-election hearing, the election and the post-election proceedings constitute one continuous proceeding. Thus, Horner contends, it is entitled to object to any time during this proceeding, and consequently its request for review of the regional director's supplemental decision preserved the issue for appeal. Horner's argument ignores that dictate of Reg. 102.67(b), 29 C.F.R. § 102.67(b) which provides that the regional director's decision and direction of election is final unless appealed.

At the onset we note that the Board's procedure allowing the regional director to determine the appropriate unit is proper. Further, inasmuch as the regional director is required to follow the same rules as the Board in making that determination, there is no requirement that the Board make an independent determination of the appropriate bargaining unit. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). Consequently, there is nothing offensive in the Board's regulation establishing the finality of the regional director's decision.

The Board has promulgated regulations providing procedures for review of the regional director's decisions at each step of the certification proceedings. If a party fails to allow the prescribed procedure at the appropriate time he is deemed to have waived his objections. This waiver policy is consistent with the Board's legitimate concern as expressed in *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946) that an "election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result." Thus the fallacy in Horner's argument, that it should be allowed to object to the preliminary issues of the appropriate bargaining unit and voter eligibility formula by way of post-election objections, is apparent.

In addition to failing to avail of the request for review procedure provided for by Reg. 102.67(b), 29 C.F.R. § 102.67(b) on the issue of the voter eligibility formula, Horner also bypassed the challenge procedure provided for by Reg. 102.69(a), 29 C.F.R. § 102.69(a). Horner's attempt to raise the voter eligibility issue by post-election objections ignores the distinction between challenges and objections as set forth in *NLRB v. A. J. Tower Co.*, *supra*, at p. 334: "Objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly. Challenges, on the other hand, concern the eligibility of prospective voters."

Horner's failure to request review by the Board of the regional director's initial decision constituted waiver of his right to a hearing on the merits before the Board, and it also resulted in a waiver of his right to court review of those issues. As a general rule, the court will not review issues not presented to the Board. National Labor Relations Act, Section 10(e), 29 U.S.C.A. § 160(e). This is so inasmuch as the court is entitled to the benefit of Board expertise. *NLRB v. Gold Spot Dairy, Inc.*, 417 F.2d 761 (10th Cir. 1969); *NLRB v. Midwestern Mfg. Co.*, 388 F.2d 251 (10th Cir. 1968); *NLRB v. Peyton Fritton Stores, Inc.*, 336 F.2d 769 (10th Cir. 1964); *NLRB v. Allied Prod. Corp.*, 548 F.2d 644 (6th Cir. 1977).

We recognize that the waiver rule may produce a harsh result. Nevertheless, it does not amount to a denial of due process as Horner contends. Due process requires only that a party be given notice and an *opportunity* to be heard. This is

not the situation presented in *NLRB v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964) or *NLRB v. Howard Johnson Co.*, 398 F.2d 435 (3d Cir. 1968) wherein the courts found the employer had never been granted an opportunity to be heard on certain issues.

Horner did raise the issue of the appropriateness of the bargaining unit at the pre-election hearing and it was "fully litigated" at that time. Horner also had the opportunity to litigate the voter eligibility formula at the pre-election hearing and through the challenge procedure. Horner was specifically apprised of its right to request review of the regional director's findings on those issues on the face of the initial decision. Horner's case is akin to the situation present in *NLRB v. Thompson Transport Company*, 406 F.2d 698 (10th Cir. 1969) wherein we said,

> ....The fundamental of *Ideal* is simple and basic—due process in an administrative hearing requires an opportunity to be fully heard upon any issue that is determinative of the rights of the parties and when that opportunity is denied at the interlocutory level no finality can be accorded the determination there made. But this principle has not been abused by the Board in the case at bar. Although the Company did seek and obtain review of the Regional Director's determination of the appropriate unit the Board acted well within its discretion in holding that the issue of Hodge's status could be best determined through the challenge procedure....In any event the Board procedures provided full opportunity for review of the Director's decision to count the Hodge vote and the Company did not seek such review. To continue the issue as appropriate in the unfair practice hearing would be but to nullify the effectiveness of § 102.67(b) and violate the cautionary words of the Supreme Court that "*** courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54.

See also: *NLRB v. WEK Drilling Co.*, 438 F.2d 267 (10th Cir. 1971) (employer who bypassed opportunity for hearing was foreclosed from raising issue in subsequent proceedings.)

Thus, we hold that the Board did not err in concluding that Horner had waived his right to object to the appropriateness of the bargaining unit and the voter eligibility formula. Accordingly, such conclusion did not violate Horner's due process rights, and we must decline to reach the merits of those issues.

II.

In a connected due process challenge, Horner contends that the regional director's failure to make specific findings of fact concerning the appropriateness of the multi-craft unit violated its due process rights.

The Board has an affirmative duty to set forth findings of fact supporting its conclusions. *NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438 (1965); *NLRB v. Groendyke Transport, Inc.*, 372 F.2d 137 (10th Cir. 1967), *cert. denied*, 387 U.S. 932 (1967); *Paceco v. NLRB*, 601 F.2d 180 (5th Cir. 1979).

We agree with Horner that the regional director failed to set forth sufficient findings of fact supporting his unit determination. Although the director did render findings of fact in support of the designation of a state-wide unit, he did not do so in support of his designation of a multi-craft unit. The regional director simply stated that the employees in the proposed unit had a community of interest, that the District Council sought to represent all of Horner's employees, and that the employees were not represented by any other union. The regional director's decision fails to apprise us of his reasons for designating a multi-craft unit as opposed to a single-craft unit. *See NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980).

Normally, we would remand when we ascertain that the regional director failed to make sufficient findings of fact. However, remand in the instant case would serve no purpose. The purpose of requiring the Board to make specific findings of fact is to enable the reviewing court to determine whether there exists sufficient evidence to support the Board's conclusions. *NLRB v. Metropolitan Ins. Co., supra*, *NLRB v. Groendyke Transport, Inc., supra*. If we should remand the case to require the regional director to make findings of fact so that

we would be better able to assess whether there was sufficient evidence to support his conclusion that the multi-craft unit was appropriate, it would be a meaningless requirment, inasmuch as we have determined that Horner waived his right to object to the multi-craft unit. A remand under these circumstances for specific findings of fact would be an exercise in futility.

III.

In regard to the issue of alleged misrepresentation made by the District Council prior to the election, Horner assigns as error, (1) the Board's failure to provide a hearing on the issue, (2) failure to make specific findings of fact, and (3) the Board's conclusion that Horner's objection was without merit.

Horner alleged in its post-election objections that the District Council misrepresented to the employees that if the District Council won the election the employees would be represented not only by the Council but also by other craft unions. In support of this allegation, Horner supplied the regional director with names of employees who had information concerning the alleged misrepresentations and also submitted a copy of a memorandum from the District Council to Horner's employees which stated, *inter alia*:

> The Council wishes to thank all of the people involved for their cooperation and wants to assure them that if the voting is favorable the District Council with the assistance of the other craft unions will do everything in their power to negotiate a favorable agreement. I would like to add that the employees have the power to reject or approve any settlement that the unions might negotiate.

At the time of the regional director's decision the standard of review of alleged misrepresentations was that announced in *Shopping Kart Food Markets, Inc.*, 228 NLRB 1311 (1977). In *Shopping Kart* the Board held that its concern would be directed at the manner in which misrepresentations were made rather than the substance of the misrepresentation. Thus, the Board would set aside an election only if the misrepresentation involved the Board or its processes. The regional director concluded that, even if Horner's employees "were told that other unions would take part in negotiations

along with petitioner or that they would be able to join other craft unions, such statements are neither clearly misrepresentations of the consequences of Board certification nor the type of misrepresentations contemplated in the Board's exceptions in *Shopping Kart*."

In its subsequent denial of review, the Board stated, "As to Objection 1 the Board was satisfied that even under the decision in General Knit of California, Inc. 239 NLRB No. 101, just issued, no substantial issues are raised warranting review (member Penello would deny review under Shopping Kart criteria)."

Subsequent to the regional director's decision, the Board had announced *General Knit of California, Inc.*, 239 NLRB No. 101 (1978) wherein it abandoned the *Shopping Kart* standard and reinstated the standard set forth in *Hollywood Ceramics Co.*, 140 NLRB 221 (1962). In *Hollywood Ceramics*, the Board held than an election would be set aside due to misrepresentations if the misrepresentations were material to the extent that they may have had an impact on the election, and if the employees did not have sufficient knowledge to make their own determination and the opposing party did not have an opportunity for rebuttal.

We hold that the Board did not err in refusing to provide a hearing on the misrepresentation issue. Under the regulations, Reg. 102.69(c), 20 C.F.R. § 102.69(c) the regional director is simply required to hold a hearing on post-election objections if there exist substantial and material issues of fact. The regional director stated in his decision that it was not clear what the employees had been told. However, the regional director did not deem the issue of fact material, nor do we. The regional director assumed the truth of Horner's allegations and nevertheless concluded that such misrepresentations did not warrant a new election. Consequently, a hearing to determine what the employees were in fact told, would not have added to or changed the result.

Similarly, we hold that the regional director did not fail in his duty to make adequate findings of fact. The regional director set forth on the face of his decision the results of his investigation.[3] Inasmuch as the facts as alleged by Horner were assumed, no additional specific findings of fact were necessary. The regional director applied the law to the facts

as alleged by Horner and concluded that the misrepresentations did not call for a new election.

Finally, Horner contends that the Board erred in concluding that the alleged misrepresentations did not warrant a new election. The court will give deference to the Board's decision and will not set aside the Board's conclusions unless it is determined that the Board acted in an arbitrary and capricious manner. *Burns Intern. Sec. Services, Inc. V. NLRB*, 567 F.2d 945 (10th Cir. 1977); *NLRB v. R. L. Sweet Lumber Company*, 515 F.2d 785 (10th Cir. 1975), *cert. denied*, 423 U.S. 986 (1975). As the regional director noted in his supplemental decision, there is nothing in the National Labor Relations Act precluding the District Council from consulting with other unions in the bargaining process. Thus, representation by the District Council that it would consult with other unions did not substantially misrepresent Board processes. The regional director's decision also indicates that he was not convinced that the employees were misled into believing that they could join other unions and that even if the employees were so informed, such information would not have been understood by the employees as having Board sanction.

[3] It appears from the investigation that final meetings were held by the Petitioner for employees both in Costilla and Tucumcari, New Mexico, one week or two weeks before the election. Some employees understood from the representatives of the Petitioner at these meetings that some other craft unions had already been contacted and that if the Petitioner won the election, employees would have an opportunity to join the craft union of their choice at a reduced rate. These other craft unions would then take part in negotiations along with the Petitioner. Other employees understood that if the Petitioner won it would then attempt to secure an understanding with other craft unions which would allow employees to be members of those other craft unions. Still other employees understood that if the Petitioner was successful in the election, the Petitioner would represent the employees in the unit.

The investigation does not clearly establish with any precision exactly what employees were told in this regard by representatives of the Petitioner. The Petitioner's letter itself is ambiguous, apparently implying that while other unions may participate with the Petitioner in negotiations with the Employer, that this participation may be active or be limited merely to consultation.

In light of our standard of review, and bearing in mind that the Board did not find that the alleged misrepresentations warranted a new election under either the *Shopping Kart* or the *General Knit* standards, we cannot hold that the Board's failure to set aside the election was arbitrary and capricious.

The Board's cross-petition for enforcement of its order is granted.

JULY TERM - September 7, 1982

Before Honorable Robert H. McWilliams, Honorable James E. Barrett, Circuit Judges, and Honorable Aldon J. Anderson, District Judge*.

A. S. HORNER, INC.,

Petitioner

v. No. 79-2185

NATIONAL LABOR RELATIONS BOARD,

Respondent

This matter comes on for consideration of Petitioner's petition for rehearing, or in the alternative, to recall and stay the mandate.

Upon consideration whereof, it is ordered that:

1. The petition for rehearing is denied.
2. The mandate of this Court issued July 15, 1982, is hereby recalled.

It is further ordered that the mandate shall be stayed until October 7, 1982, pending certiorari, and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that petitioner has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

* Of the United States District Court for the District of Utah, sitting by designation.

A.S. Horner, Inc. *and* New Mexico District Council of Carpenters, AFL-CIO. Case 28-CA-5255

November 8, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

Upon a charge filed on March 9, 1979, by New Mexico District Council of Carpenters, AFL-CIO herin called the Union, and duly served on A. S. Horner, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director of Region 28, issued a complaint and notice of hearing on April 6, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice to hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 16, 1979, following a Board election in Case 28-RC-3517, the Union was duly certified as the exclusive in the unit found appropriate;[1] and that, commencing on or about January 19, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 16, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

[1] Official notice is taken of the record in the representation proceeding, Case 28-RC-3517, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.* 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co., v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

On April 25, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 1, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a "Statement in Reply to the Notice To Show Cause and in opposition to the General Counsel's Motion for Summary Judgment." Respondent additionally filed a motion to remand and reopen the record and the General Counsel filed an opposition to the motion to remand and to the statement in reply to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgement

In its statement in reply to the Notice To Show Cause, Respondent contended that the certification of the Union in the underlying representation proceeding is invalid for the following reasons. First, Respondent argued that the Regional Director's failure to direct a hearing on its objections to the election was in error because the objections raised substantial factual issues warranting a hearing. As a corollary to this contention, Respondent also argued that the statements of witnesses taken by the Regional Office during the representation case investigation should now be made part of the current record as the representation case is now closed and the inclusion of such statements here would insure that the Board has before it a complete record upon which to determine the instant matter. Respondent further asserted that the Regional Director prejudiced Respondent's right of appeal in the representation proceeding by writing a Decision and Certification of Representation in lieu of a Report on Objections as the former limits consideration by the Board to the request for review procedure, an abbreviated form of review. Finally, Respondent contends that its initial failure to request review

of the Regional Director's unit finding and voter eligibility formula set forth in his Decision and Direction of Election did not constitute a waiver of its right to later contest these findings as objections to the election.

In its motion to remand, Respondent argues that the record before the Board in this proceeding is presently incomplete as it does not contain the statements and affidavits of employees interviewed by the Regional Director in the investigation of the objections. Respondent seeks inclusion of these documents in the record.

In opposition to Respondent's various motions, the General Counsel argues that the import of Respondent's motion to remand is contrary to the Board's Rules and Regulations and its statement in opposition to the summary judgment motion is generally an attempt to relitigate issues already decided adversely to Respondent. We find merit in the General Counsel's position and we shall enter summary judgment against Respondent for reasons described below.

Our review of the record herein, including the record in Case 28-RC-3517, reveals that on August 23, 1978, the Regional Director for Region 28 issued a Decision and Direction of Election in Case 28-RC-3517 in which he found appropriate a unit of all construction employees, including timekeepers, employed by Respondent in the State of New Mexico with various exclusions. In his decision, the Regional Director found, *inter alia*, that in view of the imminent completion of Respondent's construction activity near Costilla, New Mexico, no useful purpose would be served by directing an election in a unit limited to the employees involved therein, the unit initially sought by the Union. However, as the Union had indicated a willingness to proceed to an election in a statewide unit, a unit found appropriate by the Regional Director, an election in that unit was directed by the Regional Director provided that the Union submitted an adequate showing of interest in the broader unit. Respondent did not seek review of the Regional Director's decision. Thereafter, on September 22, 1978, pursuant to the Decision and Direction of Election, a secret-ballot election was conducted. The tally of ballots revealed that a majority of the valid ballots had been cast for the Union and that the one challenged ballot was not determinative. On September 19, 1978, Respondent timely

filed objections to conduct affecting the results of the election. On November 14, 1978, the Regional Director issued a Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certification of Representative wherein he overruled the Employer's objections in their entirely and issued a Certification of Representative to the Union. Respondent's four objections alleged that (1) the Union had mischaracterized and misrepresented Board procedures; (2) the Union had improperly extended a waiver of initiation fees to eligible voters; (3) the unit in which the election was conducted was inappropriate; and (4) the Regional Director had used an inappropriate voter eligibility formula in his Decision and Direction of Election, resulting in the disenfranchisement of potential voters. The Regional Director overruled Objection 1, finding that the Union's statement did not constitute a misrepresentation under the Board's Decision in *Shopping Kart Food Market, Inc.*[2] The Regional Director also found Objection 2 without merit, noting that his investigation had failed to produce any evidence which indicated that the Union's offer to waive initiation fees was tied to the signing of an authorization card or becoming a member of the Union prior to the election. With respect to Objections 3 and 4, regarding the unit issue and voter eligibility formula, the Regional Director found these objections raised issues which were discussed in his Decision and Direction of Election and as to which Respondent had not sought review. Thereafter, he concluded that Respondent was precluded from raising these issues at this stage of the proceeding.

On December 5, 1978, Respondent filed a request for review of the Regional Director's Supplemental Decison, alleging that the Regional Director had erroneously overruled Respondent's four objections. On January 16, 1979, the Board, by telegraphic order, denied Respondent's request for review, but granted Respondent's motion, filed December 29, 1978, to stay the effective date of the certification and ordered that the certification would be effective as of January 16, 1979.[3]

[2] 228 NLRB 1113 (1977).

[3] In its telegraphic decison denying Repondent's request for review, the Board noted that Objection 1 did not constitute a misrepresentation under its recent decision in *General Knit of California, Inc.*, 239 NLRB 619 (1978). Member Penello indicated he would deny review under *Shopping Kart, supra.*

We have reviewed the contentions raised by Respondent in this proceeding and find that they raise no issues warranting a stay of a grant of summary judgment. Respondent avers that a hearing is necessary to resolve key factual issues raised in Objection 1 involving allegedly misleading statements concerning the identity of the union or unions that would be participating in negotiations on behalf of the employees. Respondent unsuccesfully raised this argument in its request for review and we again find it without merit inasmuch as the Regional Director, in making this recommendation, assumed the facts as alleged by Respondent and nevertheless found the conduct unobjectionable. Respondent raises the same argument as previously raised and rejected in the representation proceeding with respect to Objection 2 involving an allegedly improper offer to employees to waive initiation fees. With respect to Respondent's request that statements of witnesses obtained by the Region during the representation case be incorporated into the instant unfair labor practice proceeding, we note that in a recent decision[4] the Board was confronted with a similar request and denied it. The Board stated there "such material is not part of record in either an unfair labor practice case or its underlying representation case 'within the meaning of Sections 102.68 and 102.45(b) of the Rules and Regulations of the Board, nor are such documents [materials relating to the representation case] encompassed within the requirements of Section 9(d) of the Act.' "[5] We reach the same conclusion here.[6]

With respect to Respondent's contention that the Regional Director limited Respondent's right of appeal by the manner in which he disposed of Respondent's objections, i.e., by a Supplemental Decision and Certification of Representative, we find that in rendering his decision the Regional Director proceeded in a manner authorized by Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended. We therefore find the Regional Director's action appropriate and

[4] *Harvey Engineering & Manufacturing Corporation*, 240 NLRB 699 (1979).

[5] *Id.* at fn. 1 and cases cited therein.

[6] As noted, Respondent has also filed motion to remand and reopen the record to admit these statements into the record. For the reason discussed immediately above, Respondent's motion is hereby denied.

not subject to collateral attack by Respondent. Furthermore, we note that Respondent was entitled to appeal the decision through the request for review procedure and, in fact, Respondent exercised that right.

Finally, we find that Respondent's failure to contest the Regional Director's unit determination and voter eligibility formula through the request for review procedure constituted a waiver of its right to appeal that finding in a subsequent proceeding. The preelection review process was the appropriate forum for raising such matters, and by neglecting to utilize it Respondent is precluded from asserting those issues now before us.[7]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[8]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in its unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

[7] See, e.g., *Walnut Mountain Care Center*, 236 NLRB 284 (1978).

[8] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67 (f) and 102.69(c).

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New Mexico corporation, engaged in the construction industry, and maintains its principal place of business in Littleton, Colorado. Respondent has been engaged in construction business at various locations in New Mexico including Costilla, Folsom, Tucumcari, and Mosquero. During the 12 months preceding the complaint's issuance, a period which is representative of its operations at all times material herein, Respondent, in the course and conduct of its business, purchased goods and materials in excess of $50,000 which were delivered to its place of business in New Mexico directly from locations outside the State of New Mexico.

II. THE LABOR ORGANIZATION INVOLVED

New Mexico District Council of Carpenters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All construction employees including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors as defined in the Act.

2. The Certification

On September 22, 1978, a majority of the employees of

Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28 designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on January 16, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 19, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 19, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since January 19, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occuring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engag-

ing in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, make the following:

CONCLUSIONS OF LAW

1. A. S. Horner, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. New Mexico District Council of Carpenters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All construction employees, including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen and guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 16, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 19, 1979, and at all times thereafter, to bargain collectively with the above-named labor

organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, A. S. Horner, Inc., Littleton, Colorado, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with New Mexico District Council of Carpenters, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All construction employees, including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors within the meaning of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay,

wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at construction sites in New Mexico where Respondent is engaged in construction, including Costilla, Folsom, Tucumcari, and Mosquero, copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[1] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with New Mexico District Council of Carpenters, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All construction employees, including timekeepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors within the meaning of the Act.

A. S. HORNER, INC.

United States Code
Title 29 - Labor

§ 153. National Labor Relations Board

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

§ 160.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of the extraordinary circumstances. The

findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jursidiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and

shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered a a whole shall in like manner be conclusive.

Code of Federal Regulations
Title 29 - Labor

§ 102.60. Petitions

(a) *Petition for certification or decertification; who may file; where to file; withdrawal.* A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed,[4] and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. Four copies of the petition shall be filed. Except as provided in § 102.72, such petitions shall be filed with the regional director for the regions wherein the bargaining unit exists or, if the bargaining unit exists in two or more regions, with the regional director for any such regions. Prior to the transfer of the case to the Board, pursuant to § 102.67, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After

the transfer of the case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

[4] Blank forms for filing such petitions will be supplied by the regional office upon request.

(29 FR 15919, Nov. 28, 1964)

§102.63. Investigation of petition by regional director; notice of hearing; serving of notice; withdrawal of notice.

(a) After a petition has been filed under § 102.61 (a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under § 102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this paragraph (b) shall be in

conformance with §§ 102.64 through 102.68 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in §102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

(29 FR 15919, Nov. 28, 1964)

§ 102.67 Proceedings before the regional director: further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.

(a) The regional director may proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and one copy thereof, which may be typed carbon copy, within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on the other parties. Requests for extension of time shall be received not later than 3 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated. *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Simultaneously therewith, copies thereof shall be served on all other parties to the proceeding and the regional director, and statement of such service filed with the Board. The regional director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the regional director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted, ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner; and all ballots shall be impounded and remain unopened pending such decision.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating

the request. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board eight copies of a statement in opposition thereto, which shall be duplicated and served in accordance with the requirements of paragraph (b) of this section: except that if personal service of the request for review is made upon the Board, 10 days will be allowed. However, 3 days will not be added to either of the aforesaid prescribed periods as provided in § 102.114. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 7 days after the issuance of an order granting review, file eight copies of a brief with the Board, which shall be duplicated and served in accordance with the requirements of subsection (b) of this section. A statement of such service shall be filed simultaneously with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for

review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) If any case is transferred to the Board for decision after the parties have filed briefs with the regional director, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board eight copies of the brief previously filed with the regional director. Such copies shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. No further briefs shall be permitted except by special permission of the Board. If the case is transferred to the Board before the time expires for the filing of briefs with the regional director and before the parties have filed briefs, such briefs shall be filed as set forth above and served in accordance with paragraph (b) of this section, within the time set by the regional director. If the order transferring the case is served upon the parties during the hearing, the hearing officer may, prior to the close of the hearing and for good cause, grant an extension of time within which to file a brief with the Board for a period not to exceed an additional 14 days. Requests for extension of time in which to file a brief with the Board under authority of this section not addressed to the hearing officer during the hearing shall be filed in writing with the Board and copies thereof shall immediately be served on the other parties and the regional director. Requests for extension of time shall be received by the Board not later than 3 days before the date such briefs are due in Washington, D.C. A copy of any such request shall be served immediately on the other parties and the regional director and shall contain a statement that such service has been made. No reply brief may be field except upon special leave of the Board.

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argu-

ment or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director and shall direct a secret ballot of the employees or the appropriate action to be taken on impounded ballots of an election already conducted, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

(26 FR 3889, May 4, 1961, as amended at 29 FR 15920, Nov. 28, 1964; 42 FR 41117, Aug. 15, 1977)

§ 102. 69. Election procedure; tally of ballots, objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.

(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceedings is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompty request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition of a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming an representation interest among the employees in the unit. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an

original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made. The party filing objections shall, upon request, promptly furnish to the regional director the evidence available to it to support the objections.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c) If objections are filed to the conduct of the election or conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the regional director shall, consistent with the provisions of § 102.69(d), investigate such objections or challenges, or both. If a consent election has been held pursuant to § 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C., within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C,, with copies of such request served on the other parties, any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, with supporting brief if desired, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof together

with a copy of any brief filed on the other parties and shall file copies with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C.; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in § 102.114 will not be added to the prescribed time for filing an answering brief. Such brief shall be submitted in eight copies, printed or otherwise legibly duplicated, except that carbon copies shall not be filed and if submitted will not be accepted. Immediately upon the filing of such brief, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of the answering brief. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under § 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to § 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election.

(d) The action of the regional director in issuing a report on objections or challenging ballots, or both, following proceedings under § 102.62(b) or § 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under § 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exists which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on

said issues before a hearing officer. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in paragraphs (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in § 102.67 to the extent consistent herewith.

(e) Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable, except that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the regional director has directed that a report be prepared and served, any party may, within 10 days from the date of issuance of such report, file with the regional director the original and one copy, which may be a carbon copy, of exceptions to such report, with supporting brief, if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be field, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director; except that if personal service of the exceptions and any supporting brief is made upon the regional director, 10 days will be allowed. However, 3 days as provided in § 102.114 will not be added to the prescribed time for filing an answering brief. An original and one copy, which may be a carbon copy, shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(f) In a case involving a consent election held pursuant to § 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not

raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factural issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the dispositon of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow, upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C., with copies of such request served on the other parties, file with the Board in Washington, D.C., eight copies of exceptions to such report, with supporting brief if desired, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, on the other parties and shall file copies with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. Within 7 days from the last date on which exceptions and any supporting brief may be field, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C.; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in § 102.114 will not be added to the prescribed time for filing an answering brief. Such brief shall be submitted in eight copies, printed

or otherwise legibly duplicated, except that carbon copies shall not be filed and if submitted will not be accepted. Immediately upon the filing of such brief, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of the answering brief. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to § 102.67: *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

(g) The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, together with the objections to the conduct of the election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made as described in § 102.68, shall constitute the record in the case. Materials other than those set out above shall not be a part of the record; except that in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision. Immediately upon issuance of a report on objections or challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

(h) In any such case in which the regional director or the Board, upon a ruling on challenged ballots, has directed that

such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 3 days after the revised tally of ballots has been furnished, the regional director shall forthwith issue to the parties certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

(i)(1) The action of the regional director in issuing a notice of hearing on objections or challenged ballots, or both, following proceedings under § 102.62(b) shall constitute a transfer of the case to the Board, and the provisions of § 102.65(c) shall apply with respect to special permission to appeal to the Board from any such direction of hearing.

(2) Exceptions, if any, to the hearing officer's report or to the administrative law judge's decision, and any answering brief to such exceptions, shall be filed with the Board in Washington, D.C., in accordance with paragraph (f) of this section.

(38 FR 3961. Feb. 8, 1973, as amended at 40 FR 6204, Feb. 10, 1975)

Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-696

In the Supreme Court of the United States

OCTOBER TERM, 1982

A. S. HORNER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's failure to request the National Labor Relations Board to review the regional director's determination of an appropriate bargaining unit prior to the election constituted a waiver of further objection to the unit determination and barred court review of the merits of that issue in unfair labor practice proceedings following the election.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-696

A. S. HORNER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A13-A24) are reported at 246 N.L.R.B. 393. The Regional Director's Decision and Direction of Election and his Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certification of Representative (S.A. 1a-6a, 7a-13a) are unpublished.[1]

JURISDICTION

The amended judgment of the court of appeals was entered on July 15, 1982 (Pet. App. A1-A11) and a petition for rehearing was denied on September 7, 1982

[1] These decisions are appended hereto as a supplemental appendix ("S.A.").

(Pet. App. A12). The petition for a writ of certiorari was filed on October 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. Part 102, are set out at Pet. App. A25-A40.

STATEMENT

1. Petitioner is engaged in highway and construction work throughout the State of New Mexico. The New Mexico District Council of Carpenters, AFL-CIO ("the Union") petitioned the National Labor Relations Board for a representation election among all the construction workers at one particular project, excluding only the heavy equipment operators already represented by another union in a state-wide unit (Pet. App. A2).

After an evidentiary hearing on the petition, the Board's regional director concluded that "no useful purpose would be served" by conducting an election limited to employees in the proposed single-project unit, since work on the project had been completed (S.A. 3a). Instead, he directed an election in a multi-craft, statewide unit,[2] finding that the record evidence established a community of interests among petitioner's unrepresented employees (*id.* at 3a-4a). In particular, he found that the 13 employees at the single project in issue were classified similarly to some 47 workers at petitioner's other projects; that petitioner had contracted to perform four other construction projects in the state

[2] At the hearing, the Union expressed its willingness to proceed to an election in an alternative unit—namely a state-wide unit of the petitioner's unrepresented construction employees (S.A. 3a).

and anticipated bidding on additional projects; that its policy was to transfer employees to other projects when work on one project was completed; and that the union sought a state-wide, multi-craft unit and no other labor organization sought to represent employees on any other basis (Pet. App. A2, A15; S.A. 3a-4a).[3] Petitioner did not request the Board to review the regional director's findings concerning the appropriate unit (Pet. App. A4, A15).

The Union won the ensuing election, with twenty-seven votes for the Union, nine against, and one challenged ballot. Petitioner filed timely objections to the conduct of the election, alleging, inter alia, that the regional director had directed an election in a unit that was inappropriate for purposes of collective bargaining. The regional director noted petitioner's failure to seek Board review of the unit determination prior to the election, as permitted by the Board rules and regulations, and concluded that this failure precluded petitioner from raising that issue as a post-election objection

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[3] The regional director rejected petitioner's claim that the designation of a multi-craft unit was contrary to Board precedent, noting that, while separate craft units are appropriate, the Board has also found overall units of construction workers to be appropriate, and that there was no rule of law requiring the Board to prefer one unit over the other as the more appropriate grouping (S.A. 3a-4a).

(Pet. App. A3, A16; S.A. 12a).[4] The regional director therefore overruled petitioner's objection as to the unit and certified the Union as the employees' bargaining representative.[5] The Board denied petitioner's request for review of the regional director's certification of the Union on the ground that the request raised no substantial issues warranting review (Pet. App. A3, A16).

Petitioner refused to bargain with the Union, the Union filed charges, and an unfair labor practice complaint issued. Granting the General Counsel's motion for summary judgment, the Board held that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and entered a bargaining order (Pet. App. A3, A17-A18). With respect to the unit issue, the Board stated (*id.* at A18):

> [Petitioner's] failure to contest the Regional Director's unit determination * * * through the request

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[4] Section 102.67(b) of the Board's Rules and Regulations (29 C.F.R.) provides in relevant part (emphasis in original):

> The decision of the regional director shall be final: *Provided, however,* That within ten days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C.

Section 102.67(f) (29 C.F.R.) provides:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceedings, any issue which was, or could have been, raised in the representation proceeding.

[5] Petitioner's further objections to the election based on alleged union misconduct were also overruled by the regional director (Pet. App. A2-A3) and are not now in issue.

In addition, petitioner attempted to raise a question as to voter eligibility by post-election objection, alleging for the first time that the standard voter eligibility formula utilized by the regional director was not appropriate in this case. This objection was also overruled by the regional director (Pet. App. A2-A3), and the petition does not appear to raise any issue with respect to that ruling.

for review procedure constituted a waiver of its right to appeal that finding in a subsequent proceeding. The preelection review process was the appropriate forum for raising such matters, and by neglecting to utilize it [petitioner] is precluded from asserting t[hat] issue[] now before us.

2. The court of appeals enforced the Board's order (Pet. A1-A11). It concluded that "[petitioner's] failure to request review by the Board of the regional director's initial decision [regarding the appropriateness of the bargaining unit] constituted a waiver of [its] right to a hearing on the merits before the Board, and it also resulted in a waiver of [its] right to court review on these issues," since, under Section 10(e) of the Act, 29 U.S.C. 160(e), a court will generally "not review issues not presented to the Board" (Pet. App. A5).[6] In reaching this conclusion, the court first noted that "there is nothing offensive in the Board's regulation [29 C.F.R. 102.67(b)] establishing the finality of the regional director's decision" (Pet. App. A4, citing *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137 (1971)). The court further noted that the Board's policy of treating the failure of a party to seek review of a regional director's decision as a waiver of objections to matters decided therein is "consistent with [its] legitimate concern as expressed in *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946), that an 'election could be converted from a definitive resolution of preference into a protracted reso-

[6] Section 10(e) provides in relevant part: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

lution of objections disregarded or suppressed against the contingency of an adverse result'" (Pet. App. A5).[7]

ARGUMENT

1. Petitioner contends (Pet. 9) that the court below, in upholding the regional director's unit determination "without considering whether the decision was supported by substantial evidence in the record before it," failed "to discharge its statutory obligation under § 10(e) [29 U.S.C. 160(e)] to review fact based on substantial evidence in the record * * *." The court below properly rejected this contention.

Although Section 10(e) of the Act empowers a court of appeals to set aside a Board order that is not supported by substantial evidence on the record as a whole, that section also provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." As this Court recently emphasized, the requirement of Section 10(e) is jurisdictional and prevents judicial consideration of objections that were not initially urged before the Board. *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21. See also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness to those who

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[7] The court rejected petitioner's claim that the regional director's failure to make specific findings of fact concerning the appropriateness of the multi-craft unit raised a due process issue. The court explained that, although it considered the regional director's findings regarding the unit determination to lack the necessary specificity for judicial review, a remand for further findings on the merits would be "an exercise in futility" given the determination that petitioner had waived its right to object to the multi-craft unit (Pet. App. A7-A8).

are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only erred but has erred against objection made at the time appropriate under its practice."). Thus, a failure to raise a contention before the Board in timely fashion precludes review by the court of appeals unless there are "extraordinary circumstances" that justify the failure.

The rules adopted by the Board, in furtherance of the congressional policy of permitting the Board to delegate to its regional director its power to make unit determination subject to discretionary Board review (see *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137 (1971)), expressly state that decisions of a regional director defining the scope and composition of the voting unit "shall be final" but that any party may file a "request for review with the Board" within 10 days (29 C.F.R. 102.67(b)). The rules further provide that failure to request review of a regional director's decision "shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding" (29 C.F.R. 102.67(f)). Thus, the rules put petitioner on notice that the Board would consider objections to the regional director's unit determination only if they were filed with it prior to the conduct of the election and within 10 days after the regional director's determination, and that a failure to do so within this time period would constitute a waiver of the right to contest that determination.[8] Petitioner

[8] Since the composition of the unit has a direct bearing on eligibility to vote in the election, the Board's rule requiring that objections to unit determinations be raised prior to the election, when it is most practical for the Board to make corrections if the regional director has erred, furthers the congressional policy favoring expeditious resolution of questions concerning rep-

concededly failed to request review of the regional director's unit determination in accordance with the Board's prescribed procedures and instead proceeded directly to the election. Accordingly, the court below correctly concluded that petitioner had waived its right to contest that determination before the Board. Furthermore, since under Section 10(e) presentation of the issue to the Board is a prerequisite for judicial review, the court of appeals properly concluded that judicial review was precluded as well (Pet. App. A5).[9]

There also is no merit to petitioner's contention (Pet. 6-8) that failure to request review of the regional director's unit determination should be excused because a grant of review by the Board was so unlikely as to make the request a futile gesture.[10] This Court rejected a similar argument in *United States* v. *L.A. Tucker Truck Lines, Inc.*, *supra*, 344 U.S. at 37 (footnote omitted):

> It is urged * * * that the [agency] had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the [agency] is obliged to

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resentation. See *NLRB* v. *A.J. Tower Co.*, *supra*, 329 U.S. at 330; *NLRB* v. *Rexall Chemical Co.*, 370 F.2d 363, 366 (1st Cir. 1967).

[9] Petitioner argues (Pet. 9) that, in order to obtain court review under Section 10(e), all that is required is that an issue be raised before an "agent" of the Board. However, although the regional director might be considered an "agent" of the Board for some purposes, to regard the director as such for purposes of Section 10(e) would defeat the objective of that provision—i.e., to ensure that the Board, which is charged with the ultimate responsibility for decision, is timely apprised of, and afforded an opportunity to review, those issues that continue to be challenged.

[10] Petitioner did not raise this contention before the court of appeals. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

> deal with a large number of like cases. Repetitions of the objection in them might lead to a change in policy, or, if it did not, the [agency] would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence.

2. Petitioner's reliance (Pet. 10) on *NLRB* v. *Capital Bakers, Inc.*, 351 F.2d 45 (3d Cir. 1965), is misplaced. Although in that case the court found that an employer's failure to seek review of the regional director's unit determination prior to the election did not preclude it from raising objections to that determination in subsequent judicial proceedings, this Court's decision in *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137 (1971), undermined the continuing validity of that earlier decision. In *Magnesium Casting*, the Court cited with apparent approval the Board rules applicable here (see 401 U.S. at 138 & n.2). As previously shown (page 7, *supra*), those rules make the regional director's decision defining the scope and composition of the voting unit final, unless an appeal is taken to the Board prior to the election, and treat the failure to seek Board review as a waiver of further objection to such unit determination.

Nor is there merit to petitioner's contention (Pet. 11) that the decision below conflicts with *St. Elizabeth Community Hospital* v. *NLRB*, 626 F.2d 123 (9th Cir. 1980). There, the issue first raised in the post-election representation proceedings concerned the possible exemption of the hospital from the Act under the First Amendment. That issue called the Board's jurisdiction into question. In this case, by contrast, the issue that petitioner seeks to raise does not go to the Board's power to hear and decide the controversy, but only to whether the Board properly exercised authority that it admittedly possesses. While Section 10(e) may not foreclose judicial review of issues challenging the Board's jurisdiction (but see *St. Anthony Hospital Systems* v. *NLRB*, 655 F.2d 1028, 1030 (10th Cir. 1981)), it is clear

that it does foreclose review of other claims that were not raised at the appropriate time and in the appropriate forum.

The other cases to which petitioner points (Pet. 11-12) as evidence of a conflict in the circuits are also distinguishable. Neither *Consolidated Freightways* v. *NLRB*, 669 F.2d 790 (D.C. Cir 1981), nor *NLRB* v. *Blake Construction Co.*, 663 F.2d 272 (D.C. Cir. 1981), involved the complete omission of the review step present here. In those cases, exceptions were taken to the decision of the administrative law judge, and the critical inquiry was whether the objection made was adequate to put the Board on notice that the particular matter was still in issue.[11] Here, in contrast, it is undisputed that petitioner did not make timely objection to the regional director's decision and proceeded directly to election, objecting to the unit determination only after it lost that election.

Nor does *Procter & Gamble Manufacturing Co.* v. *NLRB*, 658 F.2d 986 (4th Cir. 1981), cert. denied, No. 81-107 (Oct. 4, 1982), conflict with the decision below. There, the Fourth Circuit permitted an issue to be raised on review despite the employer's failure to raise that issue before the Board by a motion for reconsideration. However, the Board had timely notice that the matter was being contested, for the General Counsel

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[11] In *Consolidated Freightways*, the court held that the nature of the objection was evident by the context in which it was raised. 669 F.2d at 794-795. Likewise, in *Blake Construction*, although the court noted that the exceptions were "no paragon of precision or detail," it concluded that the objections to the scope of the complaint, the substantiality of proof, and the administrative law judge's handling of the proceeding were "considerably more focused and quite different from the general *pro forma* objections found to be impermissibly vague" in cases such as *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253 (1943), and, in conjunction with the supporting brief, were adequate to preserve a due process objection. 663 F.2d at 284.

had excepted to the administrative law judge's decision on the point, and the employer had "briefed and argued" the issue to the Board (658 F.2d at 988 n.23). Here, the Board had no notice at the proper time that the unit determination was in dispute.[12]

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[12] Petitioner's reliance on *NLRB* v. *Annapolis Emergency Hospital Association*, 561 F.2d 524 (4th Cir. 1977), is similarly misplaced. In that case, the court of appeals found that the hospital had sufficiently raised the issue in the representation proceeding, and that, in any event, "the Board's error was a purely legal one, so basic in its nature that § 10(e) has no application" (*id.* at 526). Specifically, the court held that the Board exceeded its statutory authority by certifying a bargaining agent on condition that it not bargain but delegate absolute bargaining authority to another entity (*id.* at 528). Here, petitioner did not object to the unit determination at all until the post-election stage, and, even assuming that the regional director erred in making the unit determination, any such error was not analogous to the "basic," "purely legal" error involved in *Annapolis Emergency Hospital Association*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

APPENDIX

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

A.S. HORNER, INC. EMPLOYER

and

NEW MEXICO DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, PETITIONER

Case No. 28-RC-3517

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All construction employees, including timekeepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foremen, watchmen, guards and supervisors as defined in the Act.[1]

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[1] The Petitioner seeks a unit of all construction employees employed by the Employer at its irrigation construction project near Costilla, New Mexico, excluding heavy equipment operators, office clerical employees and all other employees, guards, watchmen and supervisors as defined in the Act. The parties appear to agree that the operators should be excluded from any unit found appropriate because they are presently represented by another labor organization as a part of a state-wide unit.

The Employer's position is that an election among its Costilla employees should not be conducted now because the project will be completed in the immediate future. In the alternative, the Employer asserts that it would be inappropriate to direct an election because the existing complement of employees is not representative, that a unit restricted to the particular project described in the petition would be inappropriate because of the Employer's policy and practice of transferring construction employees from one project to another, and, finally, that the inclusion in the unit of more than one craft would be improper.

The Employer is a construction contractor engaged in engineering and highway work. At the present, along with other projects discussed below, it has a project near Costilla, New Mexico, involving structural work and an irrigation canal relocation. The job commenced about the first part of March 1978, and is scheduled to be completed about Thanksgiving 1978. As of the date of the hearing, August 1, 1978, the job was scheduled to be shut down within a few weeks for a period of three weeks because of water in the canal. Thereafter, work will resume when the water is shut off, but a gradual reduction of employees at the Costilla project will commence about the last part of October 1978, and continue until the job is completed about Thanksgiving. The evidence that the job will be finished about Thanksgiving has not been controverted. The Employer does not have any work at Costilla other than this project and it does not contemplate any other work at the Costilla location in the foreseeable future. There are approximately 13 employees in the unit sought by the Petitioner and the Employer employs approximately 61 employees in the classifications the Petitioner seeks to represent at all its jobsites throughout New Mexico.

In view of the fact that there will be a temporary layoff at the Costilla job shortly, if it has not already occurred, which will last three weeks, and that the final layoff of employees at the Costilla project will commence in the latter part of October 1978, and continue gradually until the job is completed around Thanksgiving, no useful purpose would be served by conducting an election which is limited to the employees at the Employer's Costilla, New Mexico, jobsite. *M. B. Kahn Construction Co., Inc.*, 210 NLRB 1050; *Clark Construction Company, Inc.*, 129 NLRB 1348; *General Motors Corporation*, 88 NLRB 119; *Parsons Corporation*, 86 NLRB 74.

However, at the hearing, the Petitioner expressed its willingness to proceed to an election in a state-wide unit of the Employer's unrepresented construction employees. With respect thereto, the evidence discloses that the Employer presently has contracted to construct four other projects in New Mexico and anticipates bidding on other projects. The projects for which the Employer has presently secured contracts are located in the vicinity of Tucumcari, Mosquero, Las Vegas and Folsom, New Mexico. The project at Las Vegas is also nearing completion and, at the time of the hearing, it was anticipated that the Folsom project would not commence for approximately one month. Moreover, the record discloses that it is the Employer's policy to transfer employees to other projects, if available, when work on one project is completed. Including the 13 employees on the Costilla project whom the Petitioner seeks to represent, the Employer had approximately 60 similarly classified employees employed on its various projects in New Mexico at the time of the hearing.

Although the Employer contends that a unit limited to its Costilla employees is inappropriate because of their community of interest with other similarly classified employees in the State of New Mexico, it nevertheless asserts that the petition should be dismissed on the ground that the Petitioner is seeking to represent craft or functional groups which it does not ordinarily represent in the construction industry. The Employer further contends on the basis of *R. B. Butler, Inc.*, 160 NLRB 1595, and other similar cases, that the unit sought herein deviates from Board policy concerning the establishment of units in the construction industry. The Employer's reliance on such cases for the proposition that multi-craft units in the construction industry are not appropriate is misplaced. Although it is true that the Board has found separate craft or funtional groups to be appropriate units in the construction industry, the establishment of broader units is not precluded where, as here, there is evi-

dence of an existing community of interest among the employees in the various groups, the Petitioner seeks such a broader unit and no other labor organization seeks to represent the employees on any other basis. See, e.g., *Del-Mont Construction Company*, 150 NLRB 85. Likewise, there is no prohibition in the statute or Board policy against a labor organization representing craft groups other than those it traditionally represents. Accordingly, I find a unit of all construction employees employed by the Employer in the State of New Mexico to be appropriate herein.

The parties appear to agree and the record supports the conclusion that the job superintendents are supervisors within the meaning of the Act and I so find. Accordingly, I have excluded the job superintendents from the unit.

The unit placement of the general foremen and the timekeepers remain to be considered. At the hearing, evidence was developed to show that the general foremen were responsible for the disciplining of employees assigned to their crews, which, on occasion, include sub-foremen. In addition, the general foremen assign and direct the work of crew members. Accordingly, I find the general foremen to be supervisors within the meaning of the Act and, therefore, they shall be excluded from the appropriate unit.

With respect to the timekeepers, the record shows that ordinarily there is a single timekeeper at each project and that they are responsible for collecting and submitting all time and payroll information to the Employer's home office in Colorado. In addition, they maintain the Employer's cost coding system which, on occasion, requires that they visually inspect the functions being performed by the various craft or functional groups. The timekeeper also functions as parts chaser and, as such, is responsible for ordering and picking up parts for the project. Although the Petitioner would exclude the timekeepers on the ground that they are not engaged in construction work, the record shows that their work is performed primarily on the construction site and is directly related to the construction work. Moreover, the unit sought here is not limited by traditional craft lines and the fact that the timekeeper may not actually perform construction work is outweighed by evidence showing their function is in direct support of the work carried out by the construction employees. Accordingly, I shall include the timekeepers in the appropriate unit.

DIRECTION OF ELECTION[2]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election dates and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by New Mexico District Council of Carpenters, AFL-CIO.

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[2] Inasmuch as the unit found appropriate herein is broader than that sought by the Petitioner, the election directed herein is contingent upon the submission of an adequate showing of interest in the broader unit by the Petitioner within 10 days of the date of issuance of this Decision and Direction of Election. In the event the Petitioner fails to submit such an adequate showing of interest for the unit found appropriate, or notifies the undersigned of its desire to withdraw its petition within the stated time period, the Direction of Election herein shall be vacated and the petition dismissed.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Albuquerque Resident Office, 5000 Marble Avenue, N.E., Albuquerque, New Mexico 87110 on or before August 30, 1978.

No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstnaces. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by September 5, 1978.

/s/ _____

Regional Director, Region 28

Dated August 23, 1978
at Phoenix, Arizona

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 28

Case No. 28-RC-3517

A.S. HORNER, INC. EMPLOYER

v.

NEW MEXICO DISTRICT COUNCIL OF CARPENTERS,
AFL-CIO PETITIONER

SUPPLEMENTAL DECISION ON OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION AND CERTIFICATION OF REPRESENTATIVE

NOV 16 1978

Pursuant to a Decision and Direction of Election issued by the undersigned Regional Director on August 23, 1978,[1] in the above-numbered case, an election by secret ballot was conducted under the direction and supervision of the undersigned on September 22, by an agent of the National Labor Relations Board among the employees in the unit found appropriate for collective bargaining.[2] The tally of ballots served on all parties at the conclusion of the balloting showed the following:

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[1] All dates herein refer to 1978, unless otherwise noted.

[2] All construction employees, including timekeepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foremen, watchmen, guards and supervisors as defined in the Act.

Approximate number of eligible voters	41
Void ballots	1
Votes cast for Petitioner	27
Votes cast against participating labor organization	9
Valid votes counted	36
Challenged ballots	1
Valid votes counted plus challenged ballots	37

Objections to conduct affecting the results of the election were timely filed by the Employer on September 29, with copies being served on all parties.

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned, after reasonable notice to all parties to present relevant evidence, has caused an investigation to be made of the objections. The parties were afforded an opportunity to submit evidence bearing on the issues. Having considered all the evidence submitted by the parties and otherwise disclosed by the investigation, the undersigned hereby issues the following Supplemental Decision.

THE OBJECTIONS

1. The Union unlawfully interfered with the election by misrepresenting and mischaracterizing National Labor Relations Board processes and procedures.
2. The Union interfered with the election by improperly extending a waiver of initiating fees to eligible voters.
3. The Unit in which the Regional Director directed an election was inappropriate for purposes of collective bargaining.
4. The Regional Director's Decision and Direction of Election failed to properly define voter eligibility resulting in the disenfranchisement of em-

ployees sharing a community of interest with those who were permitted to vote.

OBJECTION NO. 1:

The Employer has taken the position that in meetings on the night before the election and in a memorandum dated September 15 representatives of the Petitioner told employees that in the event the Petitioner won the election, employees would be represented by craft unions other than the Petitioner. The Employer contends that this misrepresentation of the consequences which would result from Board certification falls within the exceptions set forth in *Shopping Kart Food Market, Inc.*, 228 NLRB 1113, because it conflicts directly with the Act which provides that the certified bargaining representative will be the exclusive representative of all employees in the appropriate unit.

The Petitioner's position is that by its memorandum and by its statements in meetings prior to the election it intended only to convey to employees its intention to consult with other craft unions with regard to their respective members' wages and other terms or conditions of employment before entering into an agreement with the Employer. The Petitioner maintains that at no time did it tell employees that any union besides the Petitioner would negotiate for or represent employees. The Petitioner's memorandum is attached hereto as Appendix A. That portion of the memorandum which the Employer finds objectionable states:

> .... if the voting is favorable the District Council with the assistance of the other craft unions will do everything in their power to negotiate a favorable Agreement. I would like to add that the employees do have the power to reject or approve any settlement that the Unions might negotiate.

It appears from the investigation that final meetings were held by the Petitioner for employees both in

Costilla and Tucumcari, New Mexico, one week or two weeks before the election. Some employees understood from the representatives of the Petitioner at these meetings that some other craft unions had already been contacted and that if the Petitioner won the election, employees would have an opportunity to join the craft union of their choice at a reduced rate. These other craft unions would then take part in negotiations along with the Petitioner. Other employees understood that if the Petitioner won it would then attempt to secure an understanding with other craft unions which would allow employees to be members of those other craft unions. Still other employees understood that if the Petitioner was successful in the election, the Petitioner would represent the employees in the unit.

The investigation does not clearly establish with any precision exactly what employees were told in this regard by representatives of the Petitioner. The Petitioner's letter itself is ambiguous, apparently implying that while other unions may participate with the Petitioner in negotiations with the Employer, that this participation may be active or be limited merely to consultation.

However, even assuming that employees were told that other unions would take part in negotiations along with the Petitioner or that they would be able to join other craft unions, such statements are neither clearly misrepresentations of the consequences of Board certification nor the type of misrepresentation contemplated in the Board's exceptions in *Shopping Kart, supra*. On the other hand, it is clear that the Employer could not refuse to bargain with the Petitioner as the exclusive representative of its employees simply because it chose to include in its negotiating committee representatives from other craft unions.[3]

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[3] *General Electric Co.*, 173 NLRB 253, 254-256.

On the other hand, even a misrepresentation by the Petitioner to employees that its representation would not be exclusive but would permit actual representation by other unions, in the context this statement is alleged to have been made, would not come within the ambit of the Board's exceptions in *Shopping Kart, supra*. The investigation did not disclose evidence to establish that in making any such a statement, assuming it was made, the Petitioner invoked the Board's processes or otherwise claimed Board support for such a position. To assume such an implication would be no less contrived than to assume that the intended implication was that these things would only come to pass provided the Employer agreed.

I will, therefore, on the basis of the above and the investigation as a whole, overrule Employer's Objection No. 1 in its entirety.

OBJECTION NO. 2:

The investigation disclosed no evidence that a waiver of initiation fees was extended by the Petitioner in behalf of itself or other unions to employees who signed authorization cards or who became members of a union prior to the election. Rather, it is clear from the investigation that employees understood that if the Petitioner won the election, and, then, only after the election, employees would be permitted to join the Petitioner with a reduced initiation fee. No time deadline was indicated. No employees were told they would receive the reduced rate if they signed authorization cards before rather than after the election.

Therefore, I will overrule Employer's Objection No. 2 in its entirety.[4]

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[4] *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.SA. 270.

OBJECTIONS NOS. 3 & 4:

The Employer objects to the undersigned's failure to direct an election in a unit defined along craft lines rather than in a unit encompassing all employees. It further objects to the undersigned having failed in the Decision and Direction of Election to utilize the Board's formula for election eligibility in the construction industry as set forth in *Daniel Construction Co., Inc.*, 167 NLRB 159, and thereby disenfranchising many employees.

I note that while both the appropriate unit and employee eligibility were discussed in the Decision and Direction of Election noted above, the Employer did not request review of that Decision within the time period provided for in the Board's Rules and Regulations. Neither did the Employer request an extension of the time period for filing a request for review.

I will, therefore, overrule Employer's Objections Nos. 3 and 4 in their entirety.

SUMMARY DECISION

Based on the foregoing and the entire investigation, I conclude that the Employer's objections are without merit and, accordingly, they are hereby overruled.

CERTIFICATION OF REPRESENTATIVE

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for New Mexico District Council of Carpenters, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages,

hours of employment, or other conditions of employment.

UNIT:

All construction employees, including timekeepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foremen, watchmen, guards and supervisors as defined in the Act.

/s/

MILO V. PRICE, REGIONAL DIRECTOR[5]
National Labor Relations Board
Region 28
3030 North Central Avenue
P.O. Box 33069
Phoenix, Arizona 85067

[5] Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections are not part of the record unless included in the Regional Director's Decision or appended to the request for review, or opposition thereto which a party submits to the Board. The request for review must be received by the Board in Washington by November 27, 1978.